NO. 9392

In the

United States Circuit Court of Appeals

For the Ninth Circuit

R. J. DUDLEY,

Appellant,

vs.

HENRY A .SCANDRETT, WALTER J. CUMMINGS and GEORGE I. HAIGHT, Trustees of CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation, and CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation,

Appellees.

BRIEF OF APPELLEES

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

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This action was brought under the federal Employers' Liability Act upon an alleged cause of action that accrued on October 5, 1936. At the conclusion of the plaintiff's case the Court sustained defendant's motion for involuntary dismissal and on August 8, 1939, final judgment of dismissal was signed

and filed in the cause. (Tr. pp. 14, 15.) Notice of Appeal from the judgment of dismissal was filed November 3, 1939. (Tr. p. 16.)

Appellant's statement of the case (Appellant's brief pp. 3-14) is unduly extensive and in many instances conflicting and unintelligible. For example: On pages 3 and 4 of the brief counsel says:

> "Before appellant reported for work appellees had placed in said car a certain smoke-jack, property of the Railroad which it was shipping to Spokane, which was constructed of galvanized iron, one end of which was about 4 feet square and attached to this was a smoke stack circular in shape about 8 inches in diameter and 8 feet long, on top of which was a cross-piece of the same material and dimension; that the smoke-jack was lying lengthwise in the end of the baggage car and had a number of other packages of company material and merchandise underneath it; that circling the stack of the smoke jack were 2 flat galvanized plates which were loose upon the stack and extended out from the surface about 10 inches."

On page 6 of the brief it is stated that "the interior of the car was about 9 feet high," and on pages 7 and 8 of appellant's brief appears the following:

> "The door was open and the jack was to the right of the door on the station side near or against the wall on the floor and the sacks were in front of it. The closest end of the jack was about two feet from the doorway. At the foot of the door there were about eight or ten heavy boxes about 3 feet high and 18 inches wide, 2

feet high and a foot wide—of different sizes—that blocked the doorway. Between the doorway and the back end along side of and under and around the stack part of the jack were about ten small packages, some of which were under the stack part of the jack. Appellant arranged them in the car, first moving the heavy boxes from the front of the car door to the opposite side of the car out of the doorway. He then moved some of the packages around the smoke jack and placed them in different parts of the car where he knew they would be. Next he raised the jack. There were some packages underneath the smoke-jack which he had to get out. The smoke-jack was about 7 feet long. There was a loose disk on the stove pipe part. There was a flange probably 19 or 20 inches across on the bottom that was loose just below the disk on the pipe. (Illustrating by an exhibit in court, appellant pointed to the stack, the disk or flange of the stack and the top which is called a 'T'). He stated he never handled a smoke-jack before. He had seen them on a building or car. To his recollection none had ever been shipped before. The pipe on the part of the smoke-jack was about 8 inches across and the width extending out from the stack part was about 5 feet 6 inches. The disk he was touching was loose on the pipe and was 10 feet 12 inches from the floor."

If we accept as facts counsel's statements that the interior of the baggage car was nine feet in height; that appellant had stood up against the wall of the car the smoke-jack that was seven or eight feet long; that he was stooping over removing packages from around the base of the standing smoke-jack when it started to fall over, and his injury was received when

his hand came in contact with the sharp edge of the disk; yet, it is extremely difficult to conceive how appellant's hand could come in contact with the disk on the standing smoke-jack while the disk was "10 *feet* 12 *inches from the floor.*"

There was, of course no testimony in the record to support such statement; nor was there any evidence about the pipe or the width of anything extending out from the stack part about 5 feet 6 inches. Personally, we believe counsel intended to state *inches* instead of *feet* in both instances referred to. However that may be, it is apparent that the statements as they appear in the brief are physical impossibilities—that's all.

The above examples are amply sufficient, without further comment, to necessitate a brief statement of the facts that controlled the trial court's decision dismissing the action.

THE CONTROLLING FACTS

Appellant had been in the railroad's employment from August 4, 1909 until May 8th or 10th, 1936 or 1937. (Tr. p. 17.) He worked as brakeman for about two years, in 1910 and 1911, and as baggageman for ten or twelve years thereafter, and then as

brakeman five or six years and the remainder of the time as train baggageman. (Tr. pp. 17-18.)

On the night he received the injury, October 5, 1936, appellant reported for duty and went to work in the baggage car about thirty minutes before the leaving time of the train from Tacoma, Washington, for eastern destinations. He was employed as baggageman on that train. There was about thirty feet of the car allotted to appellant as train baggageman and there was no other representative of the appellees or other employee of the appellees in that portion of the car. The work of receiving and handling the baggage in that part of the car was wholly under the management and supervision of the appellant. (Tr. pp. 20, 21, 22).

It was dark when appellant reported for duty on October 5 at 7:30 p.m. The height of the interior of the car was about nine feet and there were about eight 25-wattage electric lights through the center of the car and four lights over the doors—twelve lights in all. (Tr. pp. 22, 23). The smoke-jack had been put into the car before the appellant arrived to go on duty. It was company material, manufactured at Tacoma in the railway shops, and it was being sent over to Spokane for use at that point. Of

its location in the car when appellant came in to begin his work, the appellant testified:

> Q. "Was the jack right flush with the wall?
> A. Yes.
> Q. Right against the wall?
> A. Yes.
> Q. On the floor next to the wall?
> A. It was probably not against the wall but right near the wall.
> Q. And the sacks were in front of that?
> A. Yes.
> Q. Was the jack protruding in a manner so as to obstruct the doorway?
> A. That was clear of the doorway.
> MR. HANLEY: Q. How far back from the opening of the doorway was the closest end of the jack?
> A. Probably about two feet." (Tr. p. 25).

After testifying with respect to some heavy boxes that blocked the doorway, appellant further testified:

> "Q. Going back, was there any material between the doorway and the back end?
> A. Yes.
> Q. How many packages there?
> A. I would say ten.
> Q. From there on and alongside of the jack were there any packages?
> A. Yes, small packages.
> Q. Where were they?
> A. Under the jack and around the jack.
> Q. Under the stack part of the jack?
> A. Yes.
> Q. There were some under the stack part of the jack?
> A. Yes.

Q. Was there any under the other end of the smoke-jack?

A. There might have been.

Q. Can you give an estimate of the number of packages or bundles located in that vicinity?

A. I would say about twelve bundles.

Q. What did you do with reference to these packages, all of them, I mean?

A. I was picking them up and looking at them, looking at the destination and placing them in the car where I could find them easily.

Q. What packages did you first touch when you first went to work on them?

A. What packages did I first touch to move them?

Q. Yes? A. I started to move some boxes.

Q. Where were those boxes located?

A. In front of the car door.

Q. Where did you move them to?

A. On the opposite side of the car.

Q. Out of the doorway? A. Yes.

Q. Then, what did you do?

A. I was moving some of the packages around the smoke-jack.

Q. Where did you place those?

A. I placed them in different parts of the car where I knew they would be.

Q. What did you do next?

A. I raised the jack.

Q. What do you mean when you say you raised the jack?

A. The jack—there was some packages underneath the smoke-jack and I raised it to get them out.

Q. Describe the smoke-jack to the jury.

A. It was about seven feet long, and there was a loose disk on the stove pipe part. There was a flange probably eighteen or twenty inches

across on the bottom that was loose just below the disk on the pipe." (Tr. pp. 26-28).

* * *

Q. Now the smoke-jack that you had in the car, was the pipe part of the smoke-jack about the same dimensions across, I would say about eight inches in diameter, about that?

A. Yes.

Q. And this disk here (indicating) that you have described, is that about the width of the disk, about five or six inches, extending out from the stack part?

A. Yes." (Tr. p. 29).

As to the movement of the smoke-jack by appellant, he testified:

"THE COURT: Just tell us what you did with it.

A. There was packages in front of it, and there was packages underneath and around it. I had to move some of those packages, and there was some packages underneath it too. In order to get at the packages I raised it up this way (indicating).

THE COURT: Did you lean it against the wall?

A. Yes.

Q. You left it there?

A. Yes.

MR. HANLEY: Q. How much time elapsed before it fell on you?

A. Probably half a minute.

Q. What were you doing at the time?

A. I was getting these packages out.

Q. Then what happened?

A. It started to move like that (indicating). I thought it was going to move—I am down on the floor getting the packages out from around it—I thought it was moving and put out my

arm to stop it and it struck me on the wrist." (Tr. pp. 32, 33).

* * *

"Q. How did you find out where it was going?
A. I looked at the tag.
Q. Where was the tag?
A. Tied on the 'T' end.
Q. How did you see it was on it?
A. When I raised it up from the floor I saw it and I looked at the tag. I saw the tag up there on the 'T' end so I noticed it was going to Spokane." (Tr. p. 34).

"Q. When the smoke-jack struck your left wrist, I think you testified, did it fall clear over?
A. No.
Q. What happened to it?
A. I just kind of straightened it up." (Tr. p. 38).

With respect to the appellant's ability to see in view of the light in the car, the record is:

"THE COURT: You saw the packages, you saw what you were moving. You saw the packages and the smoke-jack, you stood it up; you were not in the dark at any time, were you? A. No, sir.
Q. You did not have to grope for anything, did you?
A. No, sir.
Q. You knew what the object was?
A. Yes, sir.
Q. You had light enough for that?
A. Yes, sir. (Tr. p. 40).

* * *

"THE COURT: Q. When you stood it up you saw its contour and you saw the parts that made it up?
A. Yes sir.

Q. You stood it up because you wanted it out of the way?

A. Yes, sir.

Q. That occurred long after you had looked at the tag?

A. The accident?

Q. When you stood it up?

A. Yes, sir.

Q. Then you went about your work?

A. Yes, sir.

Q. You testified you raised it up; you stood it up, did you?

A. Yes, sir.

Q. Then you stooped down to do some other work?

A. Yes.

Q. And in about half a minute it fell?

A. Yes.

Q. Getting back to the accident, then after about half a minute it fell towards you and you put out your left arm to put it to rest, to stop it, and it cut you?

A. Yes.

Q. All of this time this happened you were stooping?

A. Yes.

Q. You could see what the object was in front of you?

A. Yes." (Tr. p. 41).

The foregoing excerpts from the record show all of the facts material to the disposition of this case on this appeal; to which may be added, as explanatory, that the train conductor called as a witness by appellant, testified that the disk or sleeve around the pipe of the smoke-jack referred to was not sharp-

ened like a knife, but that it was just the raw edge of the metal. (Tr. pp. 72, 73.)

Upon the foregoing facts established by the plaintiff's evidence the trial court sustained the defendants' motion for involuntary dismissal. (Tr. p. 99.) No motion for new trial was made or presented and on August 8, 1939, the court signed its judgment dismissing the action.

In sustaining the motion to dismiss the trial court analyzed the controlling facts and applied the law with a convincing force that completely answers the argument made by the appellant on this appeal. So pertinent is the decision to the applicable facts of the case that we quote it in full from the record.

"COURT'S DECISION

> THE COURT: Gentlemen, I have allowed extensive arguments because I felt that, irrespective of the conclusion that I reach in this matter, a discussion of the problems of law involved would help clarify to the Court the position of the parties, so that even though the motion be denied, the Court would have the benefit of that as a guide in instructing the jury. I think the disagreement between counsel can be outlined in this manner, the difficulty results not so much from what the law is, but from the application of the law to the particular facts. As I had occasion to say yesterday, that the principle of proximate cause is well known and the principle

is recognized as ultimately the question of what the proximate cause was for the jury to determine. Contributory negligence is out of the case because of the Employer's Liability Act, I think it is Section 53 of Title 45 * * * (Citing cases.) The facts clearly show, whether you approach them from the standpoint of proximate cause, that the proximate cause of the injury was not anything that the defendant did. The defendant placed this object in the car but it was there in full view. While it is true it was possibly dim, it is evident that there was ten twenty-five watt lights in the center of the car and for a man working near the door at 7:30 o'clock in the afternoon, they provided light enough to see the objects there, he could distinguish them there. He saw the jack, and said it was made of corrugated iron. He saw under it and above it and around it where there was other objects that he had to handle in performing his duty. He was there for the purpose of arranging the car and started out arranging the car to suit himself. Had this jack been set up by the company and had he, while removing one of the sacks, caused it to fall and came into contact with it, it might have presented the question to the jury as to whether placing it in that position where it might fall didn't present a question of fact. Now, repeatedly we have cases of negligence involving falling objects and in these cases it is held that where the object was placed by the employer in a position where it might fall and it did actually fall and someone has an injury, invitee or employee, the question then is one for the jury. But, in this particular case, the object was placed by the employer in a position where it didn't cause the injury, where it could not cause the injury unless he stumbled against it, assuming that it had a raw edge. In arranging

his objects to suit himself, it is true it was his duty to pick up the objects, but he was under no compulsion to arrange them in any particular manner. The baggage had not come yet; there was no one in front asking for the baggage truck and no one hurrying him about his work. He had reported for duty and went in there to arrange his place for work. He saw these objects and proceeded with the arrangement of them in a manner to suit himself. Had something happened, had the steel strapping on the end of those boxes caused the sharp edge to come into contact with his hand, then the question of negligence would become factual, but I don't remember anything of that sort happening in this case. He picked up the package and held it over to the light to read the small label attached to it and saw it was destined for Spokane. Immediately he proceeded to put it back and arrange it in a manner he thought was a proper manner and arranged it against the wall in a standing position and then stooped and proceeded to work on the packages near and about it and it fell. Now, we don't know why it fell; many causes might have intervened; it might have been that he pulled something from in back of it or placed something right under the stack or that it may have been he placed it insecurely against the wall; in other words, we have any one of three or four causes that might have caused it. And there is no cause that is traceable to the employer but, even if we assume that the presence of this sharp instrument may have been the cause, we have several other causes and, under the authorities of these two cases, a jury would have to speculate as to which cause was the proximate cause of the injury, but I will go further and say, if the sole cause of the injury was, as alleged in the complaint, the coming in contact of the plaintiff's wrist with this smoke-jack and that

occurred after the plaintiff had placed it in a position, and the only position, in which it could fall and hurt him, that that was the proximate cause of the injury. I would go further and say, if it were the case of an axe, if we assume he had an axe with a sharp edge, placed there unprotected, that if in placing it out of the way he had suspended it on a nail and it had fallen off and damaged him, there could be no recovery. Yesterday I referred to a situation where we assumed that in placing several objects or packages he had placed them on top of each other and the top one had fallen off and the top one was found to contain heavy matter or some liquid that might be injurious to the human body, there could be no claim when the act of the employee, in arranging the material, caused that to come into contact with his body. There is no act traceable to the employer when the employer placed upon the premises an object which might have caused the injury under other circumstances; that is, if it had been allowed to remain as it was, but, in fact it was not, the cause being the act of the employee in arranging the material.

I do not think that the presence of an object of this character, large and visible, which merely has a raw edge resulting from the ordinary cutting of corrugated iron, can be called a dangerous object so as to bring the case within the Squib case. For one thing the situation is so entirely different that it would require stretching our imaginations between this situation and the situation where one puts into motion a series of events which is responsible for the injury. There must be a violation of duty and the doing of a thing which results in the injury. Here the placing of the jack in the car could not by any stretch of the imagination have been the proxi-

mate cause of the injury. It was his act in putting it up in a position where it would fall on him. It might be conceived that if a dangerous object were placed in a place of work and the employee, in order to protect himself, moved it to a place adjacent which proved to be just as hazardous as the one originally existing, we might claim a continuity of events, but here there is no continuity whatsoever. The entire continuity was broken. If he had set it up in a safe way he could not have been hurt. Here it was the quick force of his arm against the falling object that caused the injury, and we do not know which of the many causes caused it to fall and not one of them is traceable to the original placing of the object by the defendant.

It is always disagreeable for Courts to have to determine that a person who evidently was injured is without remedy but we cannot create liability where the law says it does not exist and the law having said that the liability of even an employer is based on fault only, and where it affirmatively appears that it is not at fault, the fault being solely that of the employee, it becomes the duty of the Court to disregard the sympathy it might have for a person, and determine the matter strictly according to the dictates of the law, because ultimately the meaning of the rule of law which is the fundamental of our judicial system, is that it is binding upon the Courts as well. Courts cannot disregard the principles of law which are established by the Congress or the Legislative Body and interpreted by the Court and which limit liability to the circumstances of certain facts only.

The defendant's motion to dismiss will be granted and the case will be dismissed." (Tr. pp. 94-99.)

ARGUMENT

On pages 16-17 of his brief appellant's counsel insists that the trial Court should have submitted the cause to the jury as a question of fact "for the reason (A) that there was evidence of actional negligence of appellees that was the proximate cause of appellant's injury; (B) that appellant did not assume the risk of his injury as a matter of law."

Point (A) of the appellant's argument is subdivided into three parts. Part 1 asserts that there was sufficient evidence of appellees' negligence to present an issue of fact for determination by the jury. Part 2 relates to proximate cause, and part 3 discusses the effect of an intervening cause. These will be briefly discussed in the order in which they are presented in appellant's brief.

(A) 1.

In support of the contention that there was evidence of negligence on the part of appellees, on page 17 of his brief counsel says:

> "The grounds of negligence relied upon by appellant were: (a) appellees failed and neglected to wrap and protect the sharp edges of galvanized circular plates extending from stack of smoke-jack by covering them with burlap or other material; (b) appellees failed to warn appellant of the dangerous and sharp edges of

the galvanized plates prior to the time he was required to handle same."

With respect to subdivision (a), there was no evidence whatever of any rule, regulation or custom that required material of that kind to be wrapped with burlap or crated; nor was there any testimony of any witness that had handled or seen such material handled or transported, who gave any evidence whatever as to the manner in which property of that character should be prepared for transportation.

The appellant testified that he had never seen a smoke-jack before except on the top of cars or buildings, and of course his opinion as to how it should be prepared for shipment added nothing in support of that ground of negligence.

This smoke-jack was made in the railway company shops at Tacoma and it had been placed in the baggage car as company material to be delivered at Spokane. It was not a shipment of an article as a common carrier service by the railway company, but was the movement of its own manufactured article for use in another part of its operations.

Moreover, the smokejack had been placed on the floor against the sidewall of the car with a tag on the end which advised appellant that it should be put off at Spokane. There was no occasion whatever for

appellant to move the smoke-jack until the train arrived at Spokane. It was not in the way of the appellant's operations at the time he set it up and examined it and then stood it up against the sidewall of the baggage car. If there were any bundles or packages underneath it which he needed to remove, common sense demonstrates that he could easily have pulled the bundles out from beneath the smoke-jack. The physical facts overcome any statement of the appellant that it was necessary to set this article up against the wall to take out any packages he desired to move from beneath the smoke-jack. The argument on that point is wholly without merit and no ground whatever for an issue of fact as to any negligence of appellees in that respect.

Subdivision (b) is likewise without support in the testimony. If the appellant could see the writing on the tag that indicated the smoke-jack was to go to Spokane, then he could see that the smoke-jack was not crated and not wrapped as counsel says it should have been wrapped. Under such circumstances there was no reason to advise appellant of that which he could see if he had looked.

Plainly there is no merit to the contention that there was sufficient evidence of appellees' negligence to require a submission of that question to the jury.

The record is silent of any negligence that caused or contributed to the injury received by the appellant. The conclusion is too plain for further discussion. The thing speaks for itself.

(A) 2, (A) 3.

These two questions may be discussed in a single argument. They relate to proximate cause and the occurrence of the intervening cause. The authorities cited and discussed on pages 19 to 33 of appellant's brief necessarily cover both subjects and they will be considered together. Before analyzing appellant's authorities it is essential, however, to relate the fundamental principles that control the disposition of this case.

It is conceded that appellant's service at the time he received the alleged injury falls within the federal Employers' Liability Act as it existed when the accident occurred. The decisions of the Supreme Court have interpreted that Act and those decisions defining the rights and the liabilities of the parties are controlling on the disposition of this case. Under the rule of law there applied two essentials must be established before a recovery can be had. First, negligence of the employer must appear from the facts of the case; second, the negligence established must be the proximate cause of the injury received. If

either essential is not established the action must fail.

Northwestern Pacific R. Co. v. *Bobo,* 290 U. S. 499;

Atchison T. & S. F. Ry. Co. v. Toops, 281 U. S. 351, 354, 355;

Chicago, M. & St. P. R. Co. v. *Coogan,* 271 U. S. 472;

Atchison T. & S. F. Ry. Co. v. *Saxon,* 284 U. S. 458;

In the present case both essentials are missing. We have pointed out that the evidence fails to show any negligence of appellees; and clearly, that negligence, if established as contended by appellant, was not the proximate cause of appellant's injury. Since the trial court preferred to dispose of the case on the last essential requirement, without deciding the first, the answer to plaintiff's argument will follow the course pursued by the court below.

On page 26 of appellant's brief counsel furnishes his sole argument as to (A) 2 in this language:

> "Proximate cause of an injury is ordinarily a question of fact for the jury to be determined in view of the circumstances of fact attending it. It is not a question of science or legal knowledge."

Following that quotation counsel cites and discusses seven court decisions which we will presently show have no application whatever to the point involved in the disposition of this case, and concludes

with a textbook quotation from *Roberts Federal Liability of Carriers,* Vol. 2, Sec. 876.

We are inclined to agree with counsel that the proximate cause of an injury is not a question of *science* or *legal knowledge.* We would much prefer to have counsel give a definition of the term which he considered applicable to the facts of the present case. Perhaps the difficulty of formulating one that would support his theory of the case accounts for the omission. However that may be it is evident that *common sense* furnishes the only practical definition of the term. The proximate cause of an accident is that cause which if it had not existed the accident would not have occurred.

In this case the act of the plaintiff in standing the smoke-jack up against the wall of the baggage car was the proximate cause—the cause which if it had not existed the accident would not have occurred. As was aptly said by the trial court (Tr. p. 97): "but I will go further and say, if the sole cause of the injury was, as alleged in the complaint, the coming in contact of the plaintiff's wrist with the smoke-jack and that occurred after the plaintiff had placed it in a position, and the only position, in which it could fall and hurt him, that that was the proximate cause of the injury."

In the cases cited in appellant's brief under this subject, the place or condition created by the defendant had not been changed or altered by the plaintiff or by any other person. The question in each case was whether the negligent act of the defendant was the proximate cause of the injuries sustained by the plaintiff. None of them have any application whatever to the facts of the present case for the reason given by the trial court in the opinion above quoted.

In the first case cited and quoted from, *C. M. & St. P. Ry. Co.* v. *Kellogg,* 94 U. S. 469, the definition of the term "proximate cause" is given in the following language:

> "The question always is: Was there any unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

Reference to the opinion shows that counsel's quotation erroneously uses the word "force" for the word "facts" as it appears in the opinion.

We have no fault to find with the definition given by the learned Court. The case has no application to the present case, for here there was a "new and independent cause intervening between the wrong and injury."

In *Davis* v. *Wolf,* 263 U. S. 239, the second case cited under this subject in appellant's brief, the employee fell from a car due to the defective condition of a grab-iron.

In *Baltimore & O. R. Co.* v. *Tittle,* 4 Fed. (2d) 818, the injury to the employee was sustained when the knuckle of a coupler fell on him after he had pulled out the knuckle pin to loosen the knuckle. The injury was due to the defective condition of the knuckle.

In *Hines v. Smith,* 275 Fed. 766, the fireman was killed when struck by a locomotive, and the defective automatic bell ringer operated by the defendant was the alleged proximate cause of the fireman's death.

In *Erie R. R. Co.* v. *Schleenbaker,* 257 Fed. 667, the conductor was injured when he missed the grab-iron on the caboose due to the condition of the lights on the caboose.

In *Erie R. R. Co.* v. *White,* 187 Fed. 556, the employee was killed while walking between cars in a moving train due to the defective blocking of a guard rail.

In *Donegan* v. *Baltimore & O. R. Co.,* 165 Fed. 869, the plaintiff, a brakeman on a freight train, was injured due to a broken automatic coupler on one of the cars while he was attempting to make a car coupling.

The mere statement of the manner in which these injuries occurred in the cases cited demonstrates that they can have no application to the facts of the present case. In every one of them the condition upon which the charge of negligence is based was the act or responsibility of the employer, and in none of them was there any change or alteration whatsoever in that condition by the injured party or by any other employee or agent of the employer.

The citation from *Roberts Fed. Liability of Carriers,* Vol. 2, Sec. 876, appearing on page 29 of appellant's brief, is supported by cases cited in the footnote that are of the same type as the cases cited by appellant's counsel above discussed. It is pertinent to suggest that the section following the one quoted from provides:

> "On the other hand, if such causal relation does not appear, in any legitimate view of the evidence, and finding of the existence must rest wholly upon specultaion or conjecture, the question may be withdrawn from a jury, or if submitted the verdict set aside."

On page 29 of appellant's brief the case of *Crane* v. *Oliver Chilled Plow Works,* 280 Fed. 954, a decision of this Court is cited and discussed. In that case this Court on page 957 in the opinion, quotes and approves the language of Mr. Justice Strong of the Supreme Court in the *Kellogg* case (94 U. S. 469)

above quoted, and the definition of proximate cause as given in that opinion was approved by this Court.

Without encumbering this brief with a further discussion of this subject, we refer to the decisions of the Supreme Court hereinbefore referred to as sustaining the rule applicable to the established facts of this case. Those cases hold that in order to sustain a claim under the federal Employers' Liability Act the plaintiff must in some adequate way establish negligence of the carrier and casual connection between the negligence and the injury.

A. T. & S. F. Ry. v. *Saxon,* 284 U. S. 458;

N. Y. C. Ry. v. *Ambrose,* 280 U. S. 486;

A. T. & S. F. Ry. v. *Toops,* 281 U. S. 351-354;

Davis v. *Kennedy,* 266 U. S. 147;

Railway Co. v. *Bobo,* 290 U. S. 499;

C. M. & St. P. Ry. v. *Coogan,* 271 U. S. 472;

Toledo Ry. Co. v. *Allen,* 276 U. S. 165;

Seaboard Air Line v. *Horton,* 233 U. S. 492.

Under the rule established by the Supreme Court in interpreting the Employers' Liability Act it is clear that the judgment of the trial court in disposing of this case on the ground now under discussion was correct and should be sustained.

(B.)

This point involves the argument of counsel on pages 33-41 of his brief, and cases are cited defining the application of the doctrine generally under the federal Employers' Liability Act. We need not enter into a discussion of the cases cited for the reason that the trial court's decision in dismissing the action rests primarily upon the ground that the alleged negligence of the appellees was not the proximate cause of the injury sustained by the appellant. We desire, however, to call the court's attention to the facts of this case which clearly show that the appellant assumed the risk incident to his employment of being injured by the smoke-jack falling over toward him after he had placed it upon the bundles against the wall, and while he was moving or undertaking to move some of the bundles from around and beneath the foot of the smoke-jack.

The appellant testified that he raised this jack up and read the tag which showed its destination. He also testified that the disk that encircled the smoke-jack injured his hand at the time he came in contact with the disk in undertaking to prevent the smoke-jack from falling over.

We submit that he had full opportunity to note the condition of the smoke-jack and the disks thereon

while examining it and placing it up against the wall. The disk he encountered must have been fairly well up from the bottom on the pipe of the smoke-jack or he would not have come in contact with it in trying to prevent the smoke-jack from falling over.

However that may be, the testimony is that he had charge of the arrangement of all articles in the baggage car; that he took this smoke-jack up from where it had been placed by the appellees, set it upon some packages and leaned it against the wall, and that while removing some of the packages it started to fall over and the injury was sustained while attempting to prevent the smoke-jack from falling over.

Under such circumstances he is responsible for the position in which the smoke-jack was placed. The condition which caused his injury was one created by himself. Manifestly he could not have received the injury if he had not arranged this article in the car to suit his own convenience. Under such circumstances the established rule of law is that he assumes the risk of any danger incident to the arrangement he saw fit to make of the articles in the car under his direction and control.

In *A. T. & S. F. Ry.* v. *Wyer*, 8 Fed. (2d) 30, C. C. A. 8th Circuit, announced this well-considered rule:

"And where the risks are variable, owing to

changing conditions either in the character of the work or in the way it is performed, the employee assumes the risk of such changing conditions; and especially is this true where the changed conditions have been brought about by himself or a fellow servant."

In *Darden* v. *Nashville C. & St. L. Ry. Co.,* 71 Fed. (2d) 799, at page 801, the Circuit Court of Appeals, 6th Circuit, said:

"When a servant is charged by the terms of his employment with a duty of keeping his working place safe or of making a dangerous working place secure, there is no basis for liability against the master, for the rule requiring him to furnish a reasonably safe place is not operative. The master may not be justly charged with failure to perform a duty which the servant has expressly or impliedly assumed. The risk arising from such a situation must be classified among those ordinarly incident to the employment."

In *Saunders* v. *Longview, Portland & N. R. Co.,* 161 Wash. at page 284, the Court says:

"It must be borne in mind that appellant is a blacksmith of thirty years' experience, and on the morning of the accident he himself adopted the method by which he chose to do the work and voluntarily selected his working place without direction from a general foreman. In *Newman* v. *Rothchild & Co.,* 135 Wash. 509, 238 Pac. 2, we said: 'The charge of negligence that the appellant was required to stand upon the timber which had been put in cross sticks has no merit. He had arranged it. If it was dangerous he knew it bet-

> ter than anyone else could. He had make his own place of work. If it was not a safe place, nobody was to blame but himself.' ''

Many additional cases along the same line of reasoning could be cited and discussed. The situation here involved is one that speaks for itself. It needs no authority to support the trial Judge's decision in sustaining the motion to dismiss made at the end of the plaintiff's case. Judgment appealed from should be affirmed.

STRIKING AND REFUSING TO ADMIT TESTIMONY

On pages 41-43 counsel under this subject urges that specification of error set out in his brief at page 15 requires this Court to consider the ruling of the trial Court on admissibility of certain testimony offered by the plaintiff. That subject is a matter that involves an alleged error of law occurring at the trial which, under the Rules of Practice, requires a motion for new trial. (Rule 59, Rules of Civil Procedure.) As no motion for new trial was made or presented to the trial Judge, the matter is not here for review on this appeal.

In any event, for the reasons above discussed, the judgment of the trial Court is corrcet and should be affirmed.

Respectfully submitted,

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